IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CUSTODIA BANK, INC.,

Plaintiff,

vs.

FEDERAL RESERVE BOARD OF GOVERNORS and FEDERAL RESERVE BANK OF KANSAS CITY,

Defendants.

Case No. 22-CV-125

Casper, Wyoming
October 28, 2022
1:07 p.m.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
HELD VIA ZOOM VIDEOCONFERENCE

BEFORE THE HONORABLE SCOTT W. SKAVDAHL
UNITED STATES DISTRICT JUDGE

APPEARANCES (via Zoom):

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Proceedings recorded by stenography; transcript produced by computer-aided transcription.

I N D E X

(Proceedings commenced at 1:07 p.m., October 28, 2022.)

THE COURT: Court is in session in the matter of Custodia Bank, Inc., versus the Federal Reserve Board of Governors and the Federal Reserve Bank of Kansas City. I note the presence of counsel for the parties via Zoom, and let me verify that you're there, and you can hear me and I can hear you.

Let me -- first, Mr. Scarborough, on behalf of Plaintiff, are you present?

MR. SCARBOROUGH: Yes, Your Honor. I'm present here with Mr. Ortiz; and my colleague, Jamie Wolfe, is also here but not on camera.

THE COURT: All right. And I do recognize Mr. Ortiz.

And Mr. Chadwick on behalf of the Federal Reserve Board of Governors, are you there?

MR. CHADWICK: Yes, Your Honor. Good afternoon.

THE COURT: Good afternoon. And I would also recognize Mr. Michaelson on behalf of the Federal Reserve Bank of Kansas City.

MR. MICHAELSON: Hello, Your Honor. This is Andrew Michaelson on behalf of the Federal Reserve Bank of Kansas City. I'm off camera. I'm joined by my colleague Jeff Bucholtz, who is on camera.

MR. BUCHOLTZ: Good afternoon, Your Honor.

THE COURT: Good afternoon. I note the presence of

Mr. Bucholtz, and I note the familiarity of Mr. Addleman.

MR. ADDLEMAN: Yes, Your Honor.

THE COURT: All right. And I could hear everybody.

Let me note that this matter is before the Court on Defendants' Motions to Dismiss. The motions arise out of Custodia Bank's application for access to the Federal Reserve Bank of Kansas City's master account. That application was filed on October 29 of 2020. And in addition to the application for master account, Custodia Bank initiated the process to become a member bank of the Federal Reserve in 2021.

I think that application was filed on -- October 29, actually, of 2020 was the original application for the access to the master account. And on August 5 of 2021, Custodia applied to be a member bank of the Federal Reserve System.

On March 2 of 2022, it's alleged in the pleadings that Custodia was told by the Kansas City Federal Reserve Bank that the application process had not started -- or the processing of their application had not started.

On March 3, 2022, they submitted a letter to the Kansas City Board urging their consideration and providing information. There was a meeting on March 24 of 2022 with Ms. George, and that ended the information in terms of communications back and forth.

Custodia Bank filed their Complaint in this matter

alleging eight causes of action. Those causes of action -- the first cause of action is one for unreasonable delay of agency action against both the Federal Reserve Board and the Federal Reserve Bank of Kansas City.

There is a mandamus action, also, Count 2, against all Defendants based upon 28 U.S.C. § 1361.

There is a -- Claim 3 is a separation of powers and due-process violation as alleged against all Defendants.

Count 4 is a Declaratory Judgment Act claim as an alternative to Counts 1 and 2 against all Defendants.

Count 5 is a claim for violation of the due-process clause against all Defendants.

Count 6 is an alternative claim to Counts 1 and 2 for violation of the Appointments Clause against all Defendants.

Count 7 is an alternative claim as to Claims 1 and 2 for mandamus pursuant to Title 28 § 1361 against all Defendants.

And Count 8 is an alternative claim to Counts 1 and 2 for relief under the Declaratory Judgment Act § 2201 against all Defendants.

As noted, both Defendants have filed Motions to Dismiss based upon various theories. One of those theories and one of the primary issues that the Court would see -- and I'm doing this so that you have a better idea of the focus of your arguments that I want to see and hopefully save you some

time to go through unnecessary background.

But the arguments are that Custodia has no entitlement to a master account, nor does it have any entitlement to a decision on its preferred timeline.

There is an issue as to § 4807 and its potential application of the one-year period of time.

In addition, the Board of Governors argues there's been no unreasonable delay, although exceeding the gestation period of an elephant.

The second argument is, is account determinations are discretionarily committed to the Reserve Banks. The Federal Reserve Board has nothing to do with it.

Count 3 -- or argument -- the third argument is there's an absence of justiciability as to the claims brought by Custodia and a failure to allege constitutional violation given the absence of any property interest in a master account.

The arguments, as raised by the Federal Reserve as to Count 1, the APA claims, the Federal Reserve Bank of Kansas City takes the position that it's not an agency. And even if it were an agency, there's been no unreasonable delay.

As to Counts 3 and 5, the Federal Reserve Bank of Kansas City has discretion over master-account requests; and thus, given that discretion, there is no cognizable property interest or entitlement to a master account.

There also are arguments regarding the appointment clause and unripeness and meritless claims as to those issues.

Counts 2, 4, 7, and 8 as to the declaratory judgment and mandamus, it is alleged that it -- Custodia is asserting claims that are improper and inadequately pled and unripe.

And then as to all counts, there's a claim as to prudential unripeness and that Custodia has not been denied, so there's no injury in fact. And the requested relief is not likely to redress the claimed injury, and its prudentially unripe, sounding similar to an argument out of the *TNB* case.

So those are the issues and the claims. My -- one of my first, I guess, focuses on this, and I think kind of a foundational issue aside from who is an agency and who is not, is whether or not there's any discretion to grant or deny a master account, taking the line of reasoning as Judge Bacharach had noted in his concurrence decision of the three decision in the *Fourth Corner* case.

And that involves a dissection and determination as to the application of Title 12 § 342 and Title 12 § 248a and its language there and the consistency or inconsis- -- or the conflict or non-conflict of those issues.

So those are the things that interest me. And you are free to also add to the information that you believe will help this Court determine the merits of the Motions to Dismiss.

With that, though, I would then turn to the Movants, and you have been allocated, I believe, 30 minutes of time. You should be able to see that clock.

So I would -- and I think that time was allocated given the overlap of the issues and claims raised between the Defendants jointly, the Federal Reserve Board of Governors and the Federal Reserve Bank of Kansas City.

Mr. Chadwick, what is your preference in terms of the argument and who goes first and how much time you wish to reserve?

MR. CHADWICK: Thank you, Your Honor. I think Mr. Bucholtz on behalf of the Reserve Bank is intending to begin. I think that if we could reserve five minutes combined for the Defendants, that would be appreciated.

THE COURT: All right. Well, you'll be able to see that clock, and we'll leave it at 30 minutes. But when you get down to five minutes, obviously, that will be a sign, and then you'll be eating into any rebuttal time.

So, Mr. Bucholtz, I would recognize you for oral argument.

MR. BUCHOLTZ: Thank you very much, Your Honor. May it please the Court. I'm Jeffrey Bucholtz for the Reserve Bank.

I would like to address the issues, Your Honor, that you just alluded to that you said were particularly on your

mind. I'll start, if it's all right with Your Honor, with justiciability, why we believe that Custodia lacks standing and this case is not ripe. And then after that, I'll turn to why the Reserve Bank is not an agency within the meaning of the APA and then turn to, third, why Congress gave or how Congress gave Reserve Banks discretion to decide whether to open a master account for any given institution.

And then I will defer to Mr. Chadwick on the other issues that Your Honor mentioned and anything else that he would want to add.

THE COURT: All right.

MR. BUCHOLTZ: First, standing. The most straightforward reason why we believe this case should be --

THE COURT: Hold on -- hold on one minute, Mr. Bucholtz. I'm going to give you an extra minute. My court reporter needs to get her headphones on.

(Pause in the proceedings.)

THE COURT: Okay. Let's go ahead. Go ahead, Mr. Bucholtz.

MR. BUCHOLTZ: Thank you, Your Honor.

The most straightforward reason why we believe this case should be dismissed is that Custodia does not have standing. The relief that they seek would not redress the injury that they claim. The injury they plead and the only injury they plead is that they're incurring fees to work with

a partner bank that they wouldn't incur if they had their own master account. The only relief Custodia seeks --

THE COURT: And isn't that -- isn't that a distinction from the *TNB* case? *TNB* didn't have prudential ripeness because they never even engaged in any exchanges or banking functions because they never got access to the main account. They were never able to do so.

But here, Custodia has alleged, anyway, that they have engaged in banking and that they have incurred those excess fees having to go through someone. And they've claimed that the delay, which Judge Carter found was lacking in their complaint, is the cause and claim.

Is there a distinction in that?

MR. BUCHOLTZ: Yes, Your Honor. The way Custodia has framed its injury and its claim is a little different from the way *TNB* did, exactly as Your Honor just said. I think that's because Judge Carter found that TNB's claim was essentially challenging a denial that hadn't occurred yet, and so the case wasn't ripe.

So maybe to try to solve that problem, Custodia has said they're incurring injury now with the delay.

My point is there's a redressability problem, because the injury they're claiming from the delay is incurring fees to work with a partner bank; but the relief they're seeking is not the Court to grant them a master account, which would

redress that injury. The relief they're seeking is simply to order a decision by the Reserve Bank on whether to grant them a master account up or down, yes or no.

And if that decision were no, then they would be in the same position they're in. They still wouldn't have a master account. They would still have to incur fees to work with a partner bank. So there's a redressability problem.

And the Supreme Court's decision in *Lujan* as well as many other cases that we've cited in our papers make clear that for Article III purposes, redressability has to be likely, not just speculative. At this point --

THE COURT: If I take -- if I take Judge Bacharach's position, then wouldn't that eliminate the absence of redressability?

MR. BUCHOLTZ: Well, Your Honor, I'm happy to turn to why I think you should not adopt Judge Bacharach's position. But I think, even more fundamentally, the Plaintiff is the master of their complaint. They've alleged the injury they've alleged, and the only relief they're seeking -- the only relief they're seeking at this stage is to order a decision.

And, you know, again, under Article III, relief has to be likely to redress the injury. And if the decision were ordered without the Court ordering a particular decision -- in other words, if the Court were to order only the relief that Custodia is asking for at this stage -- then I think the Court

would have to speculate about whether the Reserve Bank's decision would be up or down. And that's why we think there's a redressability problem.

But there's also -- beyond redressability and standing, there's, we think, a ripeness problem and why the Court should hold off at this stage on deciding the many issues -- the many significant issues that Custodia is trying to raise. The fundamental point on ripeness is that this -- the Reserve Bank is continuing to actively review this request. This is an ongoing process. We're doing so with an open mind and in the spirit of engagement.

Our papers discuss some of the significant issues that Custodia's request poses. I'll mention just a few. In their own words, they seek to be the, quote, first of its kind digital asset bank, unquote; to be a bridge between crypto and dollars; and to issue the Avit, which is a sort of stablecoin of their own creation.

So this is clearly not a routine or simple account request.

THE COURT: But let me ask you -- when you mention that, that this creates a risk, what degree of assessment or evaluation was done with the Bank of Mellon in New York with regards to allowing them to engage in the type of exchange?

MR. BUCHOLTZ: So, Your Honor, that wasn't my client. That wasn't the Reserve Bank of Kansas City, and so I'm not

really sure that I'm able to answer that question factually.

What I can say is the Board of Governors -- and I would defer to Mr. Chadwick to elaborate on this, but the Board of Governors filed a response to Custodia's supplemental notice about that last week and pointed out some significant differences between Custodia and the Bank of New York Mellon.

You know, to maybe pick the biggest one, the Bank of New York Mellon is a member bank. So it's supervised. And so -- and they have FDIC insurance. So they're subject to an entire regime of federal supervision and regulation that Custodia is not subject to.

And that regime, which is already in place, which already, presumably -- again, I can't speak to the facts involving BNY Mellon, but presumably has resulted in some assurance that BNY Mellon has the appropriate procedures and controls in place for anti-money laundering, for Bank Secrecy Act, for foreign-asset controls, for audit, for everything else that would be important to have in place before one embarked on engaging in a new activity that involved inherent risks like anything involving crypto.

THE COURT: And what has your client done with regards to -- have they not received sufficient information? Based upon the Complaint, there's various information that's been provided and responses to your client's concerns.

At this point in time -- and I'm probably getting

ahead of myself, but you're talking about ripeness. What else do you need? You've had two years.

MR. BUCHOLTZ: So it's -- Your Honor, it's very much an ongoing process. As recently as last week or maybe even this week, there has been information exchanged between the parties. Details of that are not in the record here, but since Your Honor asked, that's the truth.

And our position is that it doesn't do anyone any good for the Reserve Bank to act prematurely before it's ready, before it believes it has the information it needs.

If it were forced to make a decision before it had the information it needed to evaluate any given request, then, you know, presumably, if it had to act before it was ready, it would have to deny it -- sort of a without-prejudice denial -- while it was still reviewing it. That doesn't do anyone any good. It doesn't do the requestor any good. It's an arbitrary snapshot in time if one looked at only the information available at a point in time.

It's far better, in our view, to engage constructively with the requestor, to engage in an interactive process, get information that we think we need, which is, as I said, going on, really, right now. And that process is ongoing.

So it's really not -- you know, the Complaint was filed almost five months ago, but things have continued to

happen since then. And of course, the details of that aren't in the record, but it's very much an ongoing process that's really not a black box. And it really does continue to be pending with -- as I said before, my client has no predetermined view about what the results should be. My client has questions and concerns and has been asking questions and getting information and going back and forth with Custodia.

My client's view is it should continue to engage in that ongoing review rather than have time called at some arbitrary point in time before it's gotten the information that it believes it needs.

And in terms of ripeness, Your Honor, of course, if the process is allowed to play out and the end of the -- the decision at the end of the process is to grant an account, then there's no dispute. And all of the very interesting, very important legal issues raised in the Complaint and in the briefing papers here become sort of law school exam as opposed to sort of a case or controversy. The Court doesn't have to decide any of them.

But even if, at the end of that process, the Reserve Bank denies the account request, the Reserve Bank would do so with reasons. It would give reasons for the denial. That would inform any judicial review that occurred at that point.

THE COURT: How many denials -- how many denials of

master account has your client, I mean, made?

MR. BUCHOLTZ: I'm not sure that I know the specific answer to that question offhand, Your Honor, over the decades. I'm not sure that I know the answer to that. What I would say is until recently --

THE COURT: *Fourth Corner*? The *Fourth Corner* --

MR. BUCHOLTZ: I'm sorry, Your Honor. I didn't hear -- well, right. That's one example. And there's been some references in the papers in this case to a Reserve trust matter in which an account was granted and then withdrawn. There may be others over the decades. I'm really not sure, Your Honor. The Reserve Bank has been providing accounts or receiving account requests for many, many decades, so I don't know that I can give you a specific number.

What I would say is it's really only very recently that states -- first of all, it's very recent that crypto exists, of course. And so all of the issues that are specifically related to the crypto-related businesses that Custodia wants to engage in are, by definition, very recent.

And even beyond that, it's a recent phenomenon that states are granting charters that don't require federal deposit insurance that are special depository charters with different activities, different limits, different rules that raise new issues that the Reserve Banks need to consider that weren't raised before because charters like that didn't exist

before.

So again, the Reserve Bank has an open mind on this. We're continuing to ask questions, continuing to get information, continuing to review the request. And our position is it would make much more sense to let that process play out. It might end up with a result that Custodia likes. Even if it doesn't, it would end up with a decision with reasons for a denial that the Court then could review in a much more concrete context than exists right now.

Maybe I can turn, if it's all right with Your Honor, to why the Reserve Bank, in our view, is not an agency under the APA.

THE COURT: All right.

MR. BUCHOLTZ: The APA defines "agency" as an authority of the government of the United States. When Congress created the Federal Reserve System a hundred years ago, it took great care to design the Board in one way and the Reserve Banks in another way. It made the Reserve Banks corporations. It made them owned by their member banks. They created them in a way that they stood apart from the sovereign. Their employees are not employees of the government.

Courts in lots of contexts over the decades have recognized this unique status and held that the Reserve Banks are not Government agencies for purposes of, for example, the

Federal Tort Claims Act, the rule that you get extra time to appeal if a government agency is a party, and various other contexts that we've addressed in our briefs.

And what I want to make sure I address on this is two points. The first is, in the interest of time, the two cases that Custodia relies on, district court cases from the 1980s that found that the Reserve Banks were APA agencies, seem to conflate the concept of a federal instrumentality and an APA agency.

And the Ninth Circuit in *Hoag Ranch* and the Eighth Circuit in *Scott*, cases that we've cited in our papers, make clear that that's an erroneous conflation, that Congress can create entities, Congress can charter corporations without thereby necessarily making them government agencies for purposes of the APA.

And that's the case here. So we agree that the Reserve Banks are instrumentalities of the government, but that doesn't make them agencies. And the D.C. Circuit in *Dong* (phonetic), a case about the Smithsonian that both parties discuss in the briefs that we think sets out the right approach, makes the point that an entity can be entwined with the government, even deeply, without thereby necessarily being an authority of the government. And we think that's the case here.

The Reserve Banks don't have the classic markers of

agency authority, like rulemaking. In fact, Congress left no doubt about that by specifically prohibiting the Board of Governors from delegating the Board's rulemaking authority to the Reserve Banks.

And when the Reserve Banks -- the second point I just want to make is the activity that we're concerned about here, the Reserve Bank decision on whether to grant the master account, is exercising authority directly granted to Reserve Banks by Congress. It's not exercising authority delegated by the Board of Governors.

THE COURT: Where -- where is that authority granted? What --

MR. BUCHOLTZ: It's in 12 U.S.C. § 342, Your Honor. 12 U.S.C. § 342 says -- that's in a subchapter of Title 12 that's specifically addressed to the Reserve Banks. There's a different subchapter specifically addressed to the Board of Governors. Congress set out different powers and duties and structure and provisions related to Reserve Banks in one place and then, separately, Board of Governors in a different place. § 342 is addressed specifically to the Reserve Banks, and it says they may receive deposits. The Supreme Court --

THE COURT: What is the distinction, if any -- is there a difference between deposits and the 24 -- § 248a and the list of services identified there?

MR. BUCHOLTZ: I think the distinction, Your Honor,

is that 342, the provision addressed to the Reserve Banks, gives the Reserve Banks discretion about whether to accept deposits.

And then in § 248a, Congress gave to the Board -- that's a provision addressed to the Board, not to the Reserve Banks -- certain criteria that the Board needs to use in setting prices for services to be offered by the Reserve Banks.

So nothing in § 248a says who those services need to be offered to. Nothing in § 248a overrides the grant of discretion that the Supreme Court recognized as early as 1923 in *Farmers Merchants* to grant the discretion that Congress gave directly to the Reserve Banks in § 342. All § 248a says is prices have to be set by the Board according to certain criteria.

And the provision that Custodia relies on here --

THE COURT: But it says, "All Federal Reserve Bank services covered by the fee schedule shall be available to non-member depository institutions," and then it goes on.

MR. BUCHOLTZ: Yes, Your Honor. Yes. And since certainly 1980, the Monetary Control Act made Reserve Bank services available to non-member banks. That's true.

THE COURT: Let me -- let me ask you this question: If you don't have a master account, can you obtain the services identified under § 248a(b)?

MR. BUCHOLTZ: Well, through a partner bank, you might be able to obtain them. Maybe it's a -- I'm not sure as to all of them. Maybe as to some of them through a partner bank.

I take Your Honor's question, but the point I'm trying to make is, Congress specifically gave discretion in § 342 that the Supreme Court recognized 99 years ago. And nothing in § 248a, which the amendment to allow non-member banks access to services came later -- nothing there changed the discretionary nature of § 342.

And what § 248a says is when the Board is supposed to set a price schedule to price the services to be made available by the Reserve Banks. It doesn't say the Board -- that the Reserve Banks have to make those services available to any and every -- any and every bank that requests an account regardless of the risks that the Reserve Bank thinks any requestor might pose.

And it would be a very, very big deal for Congress to say that any requestor who is technically eligible is automatically entitled to a Reserve Bank master account. That would, first of all, be contrary to the way the Supreme Court understood § 342 a hundred years ago. So it would be a big deal for Congress to override that.

And it would be a big deal in terms of policy because what it would mean is even if the Reserve Bank thought a bank

requesting an account had completely inadequate anti-money laundering controls, for example, so that it would be dangerous to give that bank an account, or foreign-asset-restriction controls, it would really be a problem to give that bank access to the Federal Reserve's own balance sheet.

Custodia's position is, Congress in § 248a said, It doesn't matter. It's too bad. You have no choice. You have to give that bank an account even if you think they pose serious risk to the payment system and to the Federal Reserve's own balance sheet. That would be a very anomalous result.

THE COURT: Did Judge -- would you agree that Judge Bacharach also made that same conclusion?

MR. BUCHOLTZ: I think Judge Bacharach got it wrong, Your Honor. I think Judge Bacharach didn't address the 1923 Supreme Court decision that I've mentioned, which is an important thing you have to look at in considering the statutes.

And Judge Bacharach mistook § 248a and its relationship to § 342 because of who the different provisions are addressed to and the way they relate to each other.

I want to make sure that Mr. Chadwick has the time that he needs, but I --

THE COURT: So you don't talk so fast, I will give you five more minutes, and I'll give the other side five more

minutes. So you'll be working with 35 minutes.

MR. BUCHOLTZ: Thank you, Your Honor. Then let me make one more point about this issue, because it's a really important one.

In 2010, Congress enacted 12 U.S.C. § 5465. That provision doesn't apply here because it's about designated financial market utilities. In that provision, Custodia relies on it to say, there, Congress gave the Board of Governors, as opposed to the Reserve Banks, authority to decide whether to open an account.

But when you read that provision Your Honor, it's really significant because there, in § 5465(a), Congress gave, as to this category of entities called "designated financial market utilities," as distinct from all of the other depository institutions that are covered by § 342 -- Congress gave the Board of Governors in § 5465(a) authority to authorize the Reserve Banks, in turn, to do various things, including providing deposit accounts -- "deposit accounts" is the term Congress used in § 5465(a) -- consistent -- pursuant to § 342.

So Congress itself understood in § 5465 what the Reserve Banks do under § 342 as providing deposit accounts. And in § 5465, Congress said, as to this narrow category of designated financial market utilities, the Reserve Banks can't do that themselves. The Board of Governors has to authorize

it.

As to everyone else, under § 342, Congress had already directly given the Reserve Banks authority to provide accounts or not. Again, the Supreme Court said, in 1923, "may" means "may." And the Supreme Court has, of course, reiterated that who knows how many times since then.

So § 342 is discretionary. Congress itself, in § 5465, recognized that Congress had given the Reserve Banks, in § 342, authority to grant deposit accounts, and nothing in § 248a overrides that.

Your Honor, before I use more of Mr. Chadwick's time, I should probably turn the microphone over to him unless Your Honor has other questions for the Reserve Bank.

THE COURT: I'll reserve them.

MR. BUCHOLTZ: Thank you very much, Your Honor.

(Discussion off the record.)

MR. CHADWICK: Thank you, Your Honor. Joshua Chadwick for the Federal Reserve Board.

So to start, I would certainly agree with all that Mr. Bucholtz has had to say on behalf of the Reserve Bank, Your Honor.

As for the Board, I think we've been very clear in our briefs that the Board would not be a proper defendant in this case even if there were cognizable claims against the Reserve Bank. And of course, we don't believe that there are.

In order to bring the Board into this case, Plaintiff has gone to some extraordinary lengths to obfuscate what is a very basic fact, and that is that responsibility for master-account decisions rests with the Reserve Banks as a matter of law. Plaintiffs --

THE COURT: And what is that law is that you rely on? § 342?

MR. CHADWICK: Correct, Your Honor, which comes under a subsection entitled "The Powers of the Reserve Banks."

So even putting aside the question of discretion, it's beyond dispute that these are -- master accounts are deposit accounts; that they are opened and maintained by Reserve Banks; they're held by Reserve Banks; and in appropriate circumstances, they may be closed by Reserve Bank ares.

None of this is accomplished by the Board, which has no ability to take deposits --

THE COURT: But if the Board issues rules and regulations concerning the restrictions -- Tier 1, Tier 2, Tier 3 -- of banks that controls and impacts the decisions, are they not acting as an agency influencing and/or having control over, by virtue of their regulation, the issuance of or the non-issuance of a main account or a master account?

MR. CHADWICK: Not at all, Your Honor. Those guidelines are guidance that the Board provides consistent

with its oversight role. Of course, the Board regulates a large number of commercial banks in this country. The Board also provides guidance for those entities, and that guidance could cover account-opening principles and similar matters. This is a heavily regulated industry. The Board oversees Reserve Banks; the Board also oversees commercial banks.

But the Reserve Banks play a special role. That's by careful design of Congress in the Federal Reserve Act. They play a bankers' bank role. And Custodia attempts to plead around that fact by suggesting that the Reserve Bank is influenced by the Board's views.

Whatever views --

THE COURT: Haven't they alleged that? Do I have to accept the allegation in the Complaint that the Federal Reserve Board had responded to the Federal Reserve Bank of Kansas City directing or delaying the issuance of or determination as to the master account?

MR. CHADWICK: Your Honor, that -- those -- they're attempting to plead around the law by alleging speculative facts. But it doesn't matter that the Board has some influence or has conversations with the Reserve Banks. Obviously, the Board has issued guidelines that are meant to inform the exercise of Reserve Banks' discretion.

THE COURT: Didn't you also --

MR. CHADWICK: But the Reserve Bank has --

THE COURT: Didn't your client also, in *TNB*, issue some regulations in the middle of that litigation?

MR. CHADWICK: Yes. Well, Your Honor, the Board issued an Advance Notice of Proposed Rulemaking regarding pass-through investment entities, which is what *TNB* is. It's a business model that's different from Custodia's but that the Board identified as having potential significant monetary policy concerns and would negatively impact the ability, potentially, of the Board and the FOMC to implement monetary policy.

So that -- the Board did issue an ANPR on that. That's correct, Your Honor.

THE COURT: All right. Go ahead.

MR. CHADWICK: But again, that's a decision for the New York Reserve Bank.

THE COURT: But aren't they bound by your rules and regulations?

MR. CHADWICK: They're bound by Board rules and regulations, yes, Your Honor, just as -- as commercial banks that the Board regulates are bound by the Board's rules and regulations. But no one would say that the opening of an account by a commercial bank was a decision that was controlled or made by the Board. Those banks have agency there just as the Reserve Bank here has agency as to whether or not it will open a master account or not.

THE COURT: Agency -- or -- I'm sorry. What are you saying?

MR. CHADWICK: They have their -- they have their ability to decide one way or the other. It's not the Board's choice.

THE COURT: So here's my -- here's my quandary in this from a legal perspective: The Federal Reserve Bank of Kansas City is not an agency, and the Federal Reserve Board of Governors ain't calling the shots. So nobody -- it's kind of like mercury. I'm trying to put my thumb on it, and it just squirts.

So who -- where does the buck stop?

MR. CHADWICK: Well, Your Honor, Congress granted the Reserve Banks broad discretion in this area. The acceptance of deposits, the provision of services, these are functions that the Reserve Bank takes on and was assigned under the Federal Reserve Act. But these are similar functions.

There's no dispute here that Custodia can proceed without a master account at the Reserve Bank. There's no dispute that the various price services that the Board sets out prices for are available either through a correspondent bank or available otherwise.

The reason that the Board publishes the prices on those, Your Honor, is because there's private sector competition for all of those services. So the function that's

being performed by the Reserve Bank is not a sovereign function here. It's a unique function within the Federal Reserve System, but --

THE COURT: But could you perform that function -- or can that function be performed without the authorization of a sovereign?

In other words, you have been granted, pursuant to the statutory enactments, authority to regulate and/or control. Isn't that a sovereign function, and isn't that an agency?

MR. CHADWICK: No, Your Honor. Those -- the function of taking deposits or of -- or of securities custody or any of the other things that are listed in the price services are functions that are not sovereign in nature at all, Your Honor. They are performed by other institutions -- by many other institutions.

So the -- so I would disagree with that. And those banks are subject to national or state charters. So to engage in the business of banking, you do need some level of government authorization. You need a charter, but -- so Congress chartered the Reserve Banks. They were created by function of the Federal Reserve Act. But national banks are a creature of statute, as well, Your Honor. It's not a --

THE COURT: And let me ask you this --

MR. CHADWICK: -- distinctly sovereign function.

THE COURT: -- is there a difference between deposits of current funds and covered services?

MR. CHADWICK: The deposits? So a master account is a deposit account, Your Honor, just as if you were to go to your local bank and make a deposit. It's where deposits are received and then held by the bank.

The services are different things. They're securities custody services. They are cash-and-coin custody services. They are check-clearing. But again, all those things are not uniquely sovereign. They're done by the clearinghouse. They're done by local private clearinghouses. They're done by other banking institutions. So these are not unique government or sovereign functions.

THE COURT: Are they distinct, though? Are deposit-of-current-funds services distinct from the covered services as identified under § 248a?

MR. CHADWICK: They are distinct, Your Honor, yes.

THE COURT: All right. Thank you.

MR. CHADWICK: So if I might turn for a moment, Your Honor, to -- and this again gets to the separateness of Reserve Banks. The separateness of the Reserve Banks from the Board can't seriously be questioned. They are no mere regional offices of the Board, as one of the filings in this case has suggested, but rather, they're separately incorporated entities. They're established by Congress with

unique governance structure and specifically enumerated powers.

Accordingly, a Reserve Bank is not a, quote, federal banking agency under 12 U.S.C. § 4807, which is expressly limited to the Board, the Office of Comptroller of Currency, and the Federal Deposit Insurance Corporation, those three. No more.

Congress easily could have included the Reserve Banks in that statute had it to chosen to do so. It did not. And there's zero statutory basis for the assertion Custodia makes that § 4807 covers the Reserve Banks. There's no question it applies to the Board but, by its plain terms, has no application to the Reserve Banks.

And for all the reasons already discussed, the Board certainly agrees that the Reserve Bank is not an APA agency, but it's also not subject to the Mandamus Act, which the Tenth Circuit has said is a -- provides a drastic remedy to be used only in extraordinary circumstances.

Of course, the Board is subject to the Administrative Procedure and Mandamus Acts, but the exercise of its supervisory functions of Reserve Banks -- and here, Custodia suggests that the Board is required to take some action with respect to the Reserve Bank to get the preferred results that they would like in the preferred timeline that they would like. But that is a quintessential matter committed to agency

discretion, Your Honor. That's *Heckler v. Chaney*. That's this Court's decision in *Hi-Tech Bed Systems*. It's well established.

In any event, if the APA or Mandamus Act standards applied, there are many cases suggesting that, particularly in the sphere of economic matters like we're dealing with here, particularly where the matters are complex -- and here, they are exceedingly complex, Your Honor -- that periods of time, you know, similar to what's passed here -- in fact, much longer -- are completely understandable.

And the complexity of the Reserve Bank decision here is underscored by many potential and serious risks. And the Board's respective potential impacts on financial stability, on the ability to implement monetary policy are chief among these as are concerns about the use of Federal Reserve payment systems to facilitate --

THE COURT: Let me ask you -- and I'm going to add a minute of time. Let me ask you this question: How were those concerns adequately addressed for purposes of the New York Bank of Mellon or Bank of Mellon New York?

MR. CHADWICK: Well, to start, Your Honor, I think it's important to understand that whether the Reserve Bank of Kansas City or the Board, we're dealing -- recognizing the facts on the ground, not as the facts are limitedly pled in the Complaint, it's clear here that Custodia's business model

is much broader, involves issuance of a stablecoin, involves a suite of services that are entirely different than what, from public materials, we know BNY Mellon's limited custody service to be.

Moreover, BNY Mellon is a heavily federally regulated bank. It's federally insured. It has --

THE COURT: It's too big to fail?

MR. CHADWICK: It's not too big to fail, Your Honor, but it does have well-established anti-money-laundering, Bank Secrecy Act departments. It has close supervision on all those areas, and Custodia does not yet.

So these questions as to the Board on the membership side and the Reserve Bank on the master-account side, they're complicated questions. They have to be given due care, and that's in the public interest, Your Honor. It's not just one institution. It's the national economy, it's the national monetary policy that has to be considered, Your Honor.

And I think we're at five minutes, Your Honor, so I will stop there and reserve that unless there's further questions.

THE COURT: All right. Thank you.

I would recognize Respondent. Mr. Ortiz?

MR. ORTIZ: Thank you, Your Honor. Scott Ortiz on behalf of the Plaintiff Custodia. May it please the Court and counsel.

Your Honor, I think I'd like to address really one of the core issues you raised early on, and that is whether you can square the application of § 248a and the way the Defendants want us to basically ignore -- take out a full sentence of that provision and buy into their argument that § 342 controls with, again, the further logical extension, then, that the Kansas City Fed would have unlimited discretion and basically no reviewability as a non-agency, making decisions the Defendants have argued are paramount to the safety of the country's monetary system.

And I would suggest, Your Honor, that you simply cannot square all those arguments. There are only two jurists -- well, first off, I'd like to talk a little bit about the history of the Monetary Control Act. And, Your Honor, it was a big deal. It was reported on and written about by the leading authorities in the banking industry because it really solidified the two-tier bank system and made it clear by congressional intent on specific congressional wording that those state-chartered banks that met that qualification as a depository institution were to be provided the same services.

You asked a question a minute ago, Your Honor, that is spot-on. It seems to be uncontested in this case that a master account is a bank account for a bank. Nothing more, nothing less. A deposit is a transaction, Your Honor. It's a

service. A deposit and a master account are sufficiently -- they're not even close. You cannot make a deposit, you cannot get check-clearing services, you can't get ACH services until you get the master account. That's why it was such a sweeping pronouncement.

And I think it's important to point out to the Court both the Federal Reserve Board of Governors and the Kansas City Fed embraced that from 1980 forward. That's exactly what § 248 meant. And these state-chartered organizations that had gone through the qualifying procedures were entitled, shall be entitled to those services.

And if you look at the historical context of that, really, until you get into a litigation setting is the only time you hear this argument --

(Zoom experiencing technical difficulties.)

THE COURT: Hold on a minute if you're out there.

Mr. Ortiz, you've frozen, so we're holding.

All right. Sorry. Go ahead. You're back.

MR. ORTIZ: I apologize. I was -- I think I was talking about how § 248a has been embraced historically since 1980 by both the Board and the member banks, including the Kansas City Fed. That is spelled out in great detail in one or more of the amicus briefs to this Court.

And I would submit to the Court, Your Honor, the Defendants can't have it both ways. They cannot -- they

cannot recognize that every leading authority in the country is saying § 248a means you get master accounts if you've qualified through a state charter and you can qualify as a depository institution and never say, "No, that's not true. We still hold all the discretion on § 342, and § 248a has no application to that." That simply is an absurd conclusion.

Your Honor --

THE COURT: But, Mr. Ortiz, can you square with me this: Can you have or engage in deposits of current funds without a master account?

MR. ORTIZ: Not directly, no, Your Honor. And if you want to change Custodia's business model and you want to pay exorbitant fees and reroute your entire structure, you could go through a third-party bank and pay a high fee for each transaction, which defeats the entire purpose of your model --

THE COURT: I understand the model, but what I am trying to square is, is if § 342 gives discretion as to "may receive from other member banks or depository institutions deposits of current funds," if that function requires a master account, then doesn't that function grant discretion in whether to allow or not allow the granting of a master account?

MR. ORTIZ: No, Your Honor, because the deposit language -- if you look at § 342 in context, it lists an entire list of different things that can be considered

deposits that may be taken by the Reserve Banks. It has nothing to do with access to an account and services.

And that's why the language of § 248a is at such odds with that provision. And that's why, if you really look, Your Honor, there are only two jurists in the country that have taken a true, full analysis of this. Your counterpart, Judge Jackson in Colorado, a well-respected, conservative jurist, reached the same conclusion that § 248a meant what it said when he looked at the *Fourth Corner* bank case.

Then as you've already alluded to, Judge Bacharach, when he looked at that, his in-depth analysis looking at the positions taken by the agencies over time, the positions taken by Defendants, the only way to square the language with § 342, § 248, and even § 351 is to look at the way he's gauged it.

And, Your Honor, this is -- this is what's really discouraging from our perspective: I want you to keep in mind that this legislation that began in 2018 by the Wyoming Legislature was crafted with the help, really hand in glove, over 100 meetings, with the Kansas City Fed.

The Kansas City Fed knew at the time that legislation was beginning it was going to be an avenue where you would be dealing with blockchain and digital currency. They knew that from the word "go." And they also knew that the State of Wyoming specifically was interpreting that § 248a meant this speedy-type depository institution could get a master account

and could have services.

And the Wyoming Legislature even had it in their bill that if you try to deny us those services, the Attorney General in the State of Wyoming was going to sue you directly.

The Kansas City Fed at that time did not say, "Wait a minute. § 248a doesn't control master accounts. It has nothing to do with it. This is all § 342, and we don't care whether you get a charter or not. You're still subject to our sole, unlimited discretion."

But what they told the Wyoming Legislature was, "You don't need that provision about the Attorney General. It's not going to be necessary."

THE COURT: Tell me how the Kansas City Bank is an agency subject to APA or other -- and how, if it is, the function its performing is not discretionary and one that this Court doesn't have the power to direct.

MR. ORTIZ: Well, Your Honor, I think it's uncontested in this case. It's an important governmental instrumentality at a minimum that controls some of the most important monetary policy in the country. Because if you take their view of things, they and they alone can decide whether the two-tiered banking system really can remain intact. And they take the position that they and only they can make a final determination as to whether a state-chartered bank is even allowed to compete and be part of the access to services

that the whole Monetary Control Act was about.

So if you look at -- you talk about what's the -- what's the significance, what's the importance of the decision they're making. It's critical, according to their own briefs. It's critical. It goes to the safety of our monetary system. And then you go to their next logical extension, they're saying nobody else makes that decision but us, solely us.

And, Your Honor, I realize there are only two decisions that have looked at a Reserve Bank in the context of the APA, but they both reached that conclusion. And I would specifically point to the *Lee* decision. *Lee* really went through a nice analysis, taking into consideration some of the arguments made by Defendants today that, you bet, there are characteristics of the Kansas City Fed in a Reserve Bank that are more private in nature: the nature of their employees, the nature of some of the other things they do.

But when you look at the significance, the critical significance of the decision-making and the fact they're saying they have unlimited discretion to make the final decision, Your Honor, how could that not be an agency subject to some level of review? Because if not, then truly, Your Honor, it becomes a black box with no key where we have no idea what the rules of engagement are --

THE COURT: So what is your -- what is your position -- I understand your position on *Lee*, but how do you

distinguish or what is your thought with regards to *Scott v. Federal Reserve Bank of Kansas City* in the Eighth Circuit?

MR. ORTIZ: Yeah. And I understand they're looking at things like the Federal Tort Claims Act and other issues, and I agree they had a differing view on that, Your Honor. I acknowledge that. And they pointed out some of the characteristics.

But when you look at the *Scott* decision, it certainly didn't have the ramifications that this case does. And if you don't -- if you don't consider the Kansas City Fed an agency and you don't say that they are subject to some type of review, then you really are letting individual Reserve Banks kind of destroy the two-tiered banking system and basically abolish the ability of state-chartered banks to have access on equal footing to those services.

THE COURT: But, I mean, when they passed that Act, Mr. Ortiz, did they anticipate that they would be dealing or having banks dealing in cryptocurrency? I mean --

MR. ORTIZ: Absolutely. Well, let me -- not -- no one could have foreseen digital currency in 1980, but the cornerstone of the two-tiered system is the fact that state-chartered banks bring new innovation to the marketplace. They are bringing new innovations, new systems, new efficiencies.

THE COURT: Or new risks.

MR. ORTIZ: Well, Your Honor, I'd love to talk about

that, because that, if you look at what is uncontradicted in the record -- and what the Defendants have not even really touched upon are the immense precautions put in place by the Wyoming Division of Banking. And the fact that right out of the get-go, they put in place 772-page manuals and brought in third-party contractors to make sure that Custodia could meet all the BSA requirements, all the AML requirements, that they would have best industry practices on the same level of a member bank of the Federal Reserve.

And, Your Honor, I would submit that's why my clients were so willing to simply say, "Fine. We're willing to be subject to federal scrutiny," because they knew the exacting scrutiny they had already been put through. Because the State of Wyoming had such a vested interest to not get this wrong, Your Honor, they needed this to be something that was safe.

And when you boil it down, the Defendants are now trying to make arguments about what, ultimately, five years down the road, my client would hope to accomplish with things like Avit, that somehow that's something different than what New York Bank Mellon is doing.

And, Your Honor, at this stage, my clients and the business plan they've proposed is simply to do what Bank of New York Mellon is doing. My clients are not in the risk business. My clients are in the business of taking risk out of transactions. And my client's business model is not for

individual Bitcoin speculators that want to have somewhere for their Bitcoin. My client's business model is for blue-chip industry and companies that want to be able to have direct, efficient, and timely transactions done in real time.

THE COURT: And, Mr. Ortiz, isn't there also -- isn't there, though -- beyond just the simplification as to what they seek to do and the absence of risk that they're averted to, there's more to it in terms of security, in terms of fraud or exchanges that are unregulated or unseen and unaccounted for, such as money-laundering and those types of things.

MR. CHADWICK: That can't happen under their model, Your Honor, and here's why: You cannot be an anonymous account holder with Custodia. And if you want to transact with Custodia, have a transaction that they facilitate, you have to go through an account and have your own account, and they have met you --

THE COURT: Is that -- but, I mean, I can see -- one of the things that I've seen is, is you have to have your own account. So the LLC that was formed under Wyoming's wonderful law to the bottom under LLC law, no one knows who the LLC partners are. We have them exchanging money, but no one knows -- and four of them live in Switzerland, and three live in the Caymans.

MR. CHADWICK: Well, Your Honor, and that -- that goes to the beefiness, so to speak, of the regulatory

procedures that were put in place on the front end and the fact that Custodia has to meet the same standards that member banks do to ferret out exactly who the customers are. And that really becomes -- you know, you can't -- you have to know your customer. You have to know who the members of your LLC are. You have to know how they're making their money.

But that's only part of it, because the real crux of why this is safe is the safety deposit box of digital assets that my client is going to be holding for its customers is never touching the Fed. And my client is meeting even heightened capitalization requirements above and beyond what is required so that any risk of digital currency, Bitcoin or otherwise, remains with the customer.

And the liquidity, the capitalization standards that my client's met assure the Fed that they're not going to be in a position where they're going into a negative balance because somehow they have loaned Custodia money on a transaction.

THE COURT: I get the -- let me pull you back to the issues as to agency action and conduct and the relief that you're seeking and the legally entitled basis for it.

You argue there's a one-year deadline under § 4807. Isn't that statute limited to federal banking agency, which clearly does not include at least the Federal Reserve Bank of Kansas City?

MR. ORTIZ: Your Honor, there's -- there's a couple

of answers to that question. First and foremost, if the -- if the Board of Governors could delegate something to the Kansas City Fed or another member bank and delay for five years, ten years -- two and a half years, like this case -- and never have a deadline, that would make absolutely no sense because it would thwart the intent of Congress.

What's interesting, if you look at the definitions and you start with § 1813(z), but you look at the entirety of § 1813, they define and give a definition for virtually every type of bank in the United States: depository, lending, and otherwise.

Ironically, "Federal Reserve Bank" is nowhere listed in any of the definitions in § 1813. It's not defined. It's not listed. Your Honor, I think that's because they are putting the Federal Reserve Bank in that category of the federal agency.

It gets to the argument we've made to Your Honor. It's like you can't say that the Department of Justice does not include a regional office or does not include something from Border Patrol or something else. Because given the way the arguments raised in this case, the Federal Reserve Banks come into that forefront almost more than anyone else when you're talking about some of these delays and applications.

And how could it be congressional intent that we would simply carve out the Federal Reserve Banks and see any

application you dealt with, you had an unlimited time frame.

THE COURT: But Congress certainly knows how and what a Federal Reserve Bank is. And isn't it inferred that if they didn't include it in the definition that they intentionally did not do so?

MR. ORTIZ: Your Honor, I disagree for a couple of reasons. It's clear that there are times in the statutory scheme that "Federal Reserve Bank" is separately referenced, separately defined. But within the confines of § 1813, it's not referenced at all.

And if you look at -- and the deadlines, something as important as monetary policy and applications to have access to the Federal Reserve and the money -- the money that that controls, why would Congress carve out an exception and say the banks that can control who gets access have an unlimited timeline? They wouldn't, Your Honor.

I cannot define for you why there are some anomalies on what's defined in some of the statutory scheme and what's not, but I know one thing: The far better argument is that § 4807 applies because the Kansas City Fed, with what it does in the context of its unlimited decision-making on critical decisions, has to be an agency, has to somehow have review.

And I think in the context of that, they have to be considered part of the Federal Reserve Board of Governors.

THE COURT: By implication of their function?

MR. ORTIZ: Absolutely. I think that's the most important element of it, Your Honor, is everyone agrees in this case this is a critical decision dealing with which state-chartered banks have access to the Fed.

And that seems to be the -- and the fact that if you take their argument, they're saying that there's no review of that decision. There's no timeline. There's no written guideline as to how you get in the game. There's nothing.

You're just simply left in this purgatory, like my clients have been, where they're suffering losses on a daily basis. And they're being -- basically, their biggest fear was exactly what's happening -- and you're well aware of now -- that the big seven banks, all the traditional banks would realize they do want to be in digital currency.

Because, Your Honor, when my clients got into this, when the State of Wyoming took on this legislative effort, they knew that a lot of banks had no interest in digital currency. Many banks to this day do not see it as the future.

Custodia saw it much differently, and that's why they tried to basically be on the forefront of this. They tried to make sure they got all the scrutiny. They went through all the processes so if they got this opportunity, they would be doing it correctly and safely.

And I think that's -- that's why this is such a tragedy, Your Honor, that, you know, Bank of New York Mellon

is doing the same thing and was basically green-lighted in what looks like less than a two-month period to do what Custodia has been trying to do, you know, for two years plus at this point in time.

THE COURT: Let me ask you, how do you distinguish your situation from *TNB*?

MR. ORTIZ: Sure. There's a number of -- a number of things. First and foremost, it's clear that *TNB* basically sprung this pass-through investment entity on the Federal Reserve Bank really with no notice and no thought on the front end and no participation with them, whether that was an entity that the Reserve Bank was going to agree to or that there would be problems with the Board of Governors regardless of their state charter from Connecticut.

So clearly, they did not get involved in the type of relationship on the front end that my clients did.

I think most importantly -- and, you know, Judge Carter even kind of pointed this out. He said, I realize you're suffering losses. I realize that, you know, this is causing you injury. But, you know, you have not pled for me -- you didn't even plead it -- that delay is the problem.

We have pled that in spades, Your Honor, and we've articulated to you in spades. And contrary to what the Defendants state, that we are somehow trying to plead away legal conclusions, it's just the opposite of that.

When we talk about how we're suffering delay, it becomes this interwoven process where we knew we had timelines with the Division of Banking in Wyoming on our Certificate of Authority. We had every reason to believe early on from the Kansas City Fed that they liked our application. There were no showstoppers. You certainly look entitled to receive your master account.

And then, bam, it sits with no action for more than a year. And they are specifically told that that's because the Board of Governors has intervened, and they now are stopping the application process.

So, I mean, that's the one part of our case that is very similar to *The Narrow Bank*, Judge. This looks to be a little bit of a modus operandi by the Federal Board of Governors in that if something comes in under a § 248a request that they don't like, this is a delay tactic that they use just like the guidelines they proposed in this case, the guidelines that gave Custodia no guidance whatsoever.

Yet we're being told directly by representatives of the Kansas City Fed that they're waiting because of these guidelines, or they're waiting because there's something the Board of Governors does not approve of. Your Honor --

THE COURT: Well, you're a Tier 3, right?

MR. ORTIZ: Yeah. And so what does that mean, Your Honor? That provides zero guidance for us other than it's

just a new label that came out. And what does that mean in regard to the different preferential treatment the Bank of New York Mellon got as a Tier 1? We have no idea.

You know, this is the other -- this is the other thing that you cannot escape the reality of, Judge: They did not act on our application, the Kansas City Fed, until we filed this lawsuit. And long before we filed, we were specifically trying to gather information of why is this not moving through. And we were told it was the Board of Governors.

When we went to the Board of Governors, we got the party-line response that, Oh, no. That's a decision made by the Kansas City Fed. You've got to talk to them.

Well, Your Honor, it's clear the Kansas City Fed will not make a decision unless it is green-lighted by the Board of Governors. And that puts us, again, in this -- this landscape of delay where we are bleeding money. It's an existential threat to my clients at this point in time.

And, you know, this is the other problem, Your Honor: You heard the Defendants say, Well, this is so novel, and this is so complex, and, jeez, we need time to look at it.

Well, they've had our business plan since May of 2020. The federal banking industry, the Federal Reserve System, has multiple separate agencies that do nothing but track trends in the crypto business. They knew exactly what

we were trying to do. They've had two years to look at the application. They've had two and a half years to look at this business plan and scrutinize it.

And what they don't point out to you, Your Honor, is any concrete, tangible risk that Custodia's plan poses. They throw out something with Avit saying they don't understand it. Your Honor, they're not even -- they don't even have authority from the Wyoming Department of Banking right now for the Avit issue. That's a Year Three or a Year Five concept. All they want right now is to do what their competitors are already being allowed to do: have a master account.

And all -- and you know what, as you've seen the way we pled it, Your Honor, we're not even asking you to go where I think you could go as a matter of law and say § 248a means what it says it does, but at least for someone to make a decision or Custodia may very well end up like The Narrow Bank, sitting there now five years after their application and no decision made.

Your Honor, that's -- that's just a destruction of the two-tiered system. It's a slap in the face to Wyoming and the Special Purpose Depository Institutions. There's simply no way around that, Your Honor.

So that's -- that's why I think we're -- and that's a long answer. I understand, Your Honor. But that's why I see us dramatically different than *The Narrow Bank*, and I think

we've specifically pled why we are suffering damages now -- concrete damages because of the difference of having to try to go to a short-term, make-shift intermediary that basically defeats our ability to truly keep -- compete with the New York -- Bank of New York Mellons of the world, Your Honor.

THE COURT: And is it your position, though, that they cannot deny you access or granting of that account?

MR. ORTIZ: That is absolutely our position, Your Honor.

THE COURT: And how is that?

MR. ORTIZ: We qualified as -- through our state charter, we qualified under the definition of a depository institution, and we are in compliance with all federal and state law. Obviously, *Fourth Corner* did not meet that criteria because -- because there was some pretty good argument that maybe they were not in compliance with federal law.

And there's nothing tangible saying we're not in compliance with federal law on bank-secrecy standards or on anti-money-laundering standards or anything else. We are. And that's everything we have gone through, through the State of Wyoming and all this scrutiny we've already received.

So I think you absolutely have that within your right. But if the Court doesn't want to go that far, Your Honor, we're simply willing to say hold them to a timeline.

Have § 4807 apply to them and give us a decision. It's clearly an unreasonable delay when you consider all the factors in this case and you consider what's at stake.

And, Your Honor, here's what I think is an easy solution to the Court: There are so many factual arguments being made now where the Defendants are trying to ask you to not take as true our well-pled factual allegations and trying to argue, Well, there are additional problems, or there are additional risks, or, you know, who really made the decision?

Your Honor, you could put this on a truncated, streamlined discovery schedule and -- I would submit to you four depositions and some written discovery -- and we could -- if the Court had additional time or wanted a more fully developed record, that could be easily done in this case.

Your Honor, we gave the Defendants already the courtesy of sending our 30(b)(6) topics to them of the things right out of the gate we wanted to know. And if the Federal Board of Governors somehow is correct and they're arguing they're not a proper party to this case, they would have an obligation and an opportunity at the summary judgment stage to bring evidence to you to support that.

But right now, if you take our well-pled allegations and what -- you know, ironically, allegations pled based mostly on what the Defendants employees were telling us, then this case clearly has to proceed, Your Honor.

THE COURT: All right.

MR. ORTIZ: Any other points you'd like me to raise, Your Honor? Would you like me to -- I've got about four minutes left, but I don't need to drone on unless you have other specific questions I could answer for you.

THE COURT: Well, I guess, tell me if I'm wrong in this, but I see there's two fundamental questions that are somewhat a threshold issues in this: one is, is who is or isn't subject to the APA, and you've addressed that; and whether or not the Federal Reserve Bank of Kansas City is. And my research, my law clerk's research has revealed that there is a conflict in that. That is not a uniformly answered answer.

The second component that I see is, is what amount of discretion or lack of discretion exists? I don't -- § 4807, I'm not -- I'm not buying what you're putting down. But what I see to be at least a fundamental question and threshold in terms of your viability or plausible claim is, is the Federal Board of Kansas City subject to the APA and/or a writ of mandamus?

And then the second question is, is, if so, what -- and part of that is, I think, consumed by what level of discretion do they have in granting or denying a -- because that ties into, I believe, the issue as to the standing and the injury.

But tell me this: If they deny you, does that -- at this point, they can grant or deny. I understand your position is, is that they cannot deny. But assuming they can, how does that not affect your standing ability?

MR. ORTIZ: Because we've suffered real tangible injury right now solely based on the delay, Your Honor. And even if it's a denial, it at least gives my clients a chance to make a decision. For instance, here's a simple explanation for it: If you want to partner short-term -- on a short-term basis with an intermediary bank, they may charge you 7 cents on the dollar for every transaction they process.

But if you agreed to partner with them for three years or more and guarantee them a certain volume, maybe that number comes down to something where you might be able to compete with other people that have a direct master account. It's unlikely.

But sitting right now where they are, my clients -- my clients can't make a decision. We are -- we are in that position much like in the *Rice* case where if we can't get a decision as to where we stand, and if there's no reasonable timeline and there's no -- no expectation there will be a timeline given, then we're being denied due process, and that's a constitutional deprivation.

And I really don't care how you couch it, Judge, but you can't have -- and we still don't know, is it truly the

president of the Kansas City Fed making this decision? Is it truly the Board of Governors? Is it the Kansas City Fed itself? But the delay itself is causing us tangible injury in real time not having an answer.

And I think you -- you hit it right on the head, Judge. Given the fact we worked with them on the front end going clear back to 2018, and you comment about how much time they now claim they need to make a decision, that's unreasonable.

And we haven't talked about the *TRAC* factors, but I think if you applied the *TRAC* factors to this situation, they strongly weigh in our favor. And I realize we're not talking about human harm or injury, but you're probably talking about the existence and the viability of our business going forward, and you may be talking about the existence and viability of the speedy banks in Wyoming and whether they can survive.

So that's why, from our perspective, Your Honor, simply getting any decision from them at least starts limiting some of the harm we're suffering in real time.

THE COURT: Thank you.

MR. ORTIZ: Your Honor, if there's no other questions, I would just thank the Court for your time today.

THE COURT: Thank you.

I would turn back to -- I thought they had a little -- they had 4 minutes and 53 seconds.

All right. One minute. I'm going to take five minutes, and we'll come back, and I'll hear the rebuttal.

(A recess was taken from 2:27 p.m. to 2:32 p.m.)

THE COURT: I note the presence of the parties -- I should say the presence of counsel. I would hear rebuttal. I think we have 4 minutes, 53 seconds.

Before you begin, let me ask, particularly Mr. Bucholtz, here's the question for you: When your client issues a master account to a depository institution, is your client then able to exercise discretion over the deposits made by the depository institution?

And if you could answer that, and I'll hear anything else you have to say in your rebuttal time. I'll give him one more minute in there, 5:53.

MR. BUCHOLTZ: Thank you, Your Honor.

Yes. The answer to your question is yes. § 353 -- § 342 -- excuse me, I misspoke -- § 342 gives Reserve Banks discretion about whether to open accounts in the first place, because what you do with a master account is you put deposits in it. And the place that you put deposits, which is what § 342 says we have discretion to accept or not, is a master account. A master account is just an administrative term that Reserve Banks use for the thing you put deposits in.

THE COURT: Let me -- I may have missed it a little bit. If I have a master account, do you still -- or does your

client still retain discretion over what deposits it receives from -- can it still reject deposits even though I have a master account?

MR. BUCHOLTZ: Yes. Yes, Your Honor. I'm sorry. That's the question I was trying to answer. I just didn't get to it quickly enough.

Yes. § 342 gives both kinds of discretion: whether to open an account to accept deposits in the first place and what deposits to accept.

What I want to try to do, Your Honor, in the little bit of time that I have here is address the two issues that you said at the end were the fundamental ones, the one that you just asked about.

I think, Your Honor, it's really important to look at what Congress did and what Congress didn't do in the Monetary Control Act when it enacted § 248a and it amended § 342. It amended § 342 to add "other depository institutions" where it had previously said, "member banks," but it kept "may" as "may." We already know the Supreme Court had construed, many years earlier, "may" to mean "may."

Congress legislated against that backdrop. It did not change "may." It did not do anything in § 248a to address in any specific way the discretion that it previously had given Reserve Banks about whether to accept deposits from any given requestor. It left that intact.

And what it did is say, as a class, generally, non-member banks are eligible for the same services that shall be priced the same way, which was the innovation of the Monetary Control Act.

But nowhere in § 248a does Congress speak to the Reserve Banks at all. Nowhere does Congress say to the Reserve Banks, "We're withdrawing the discretion that we gave you previously in § 342."

Congress legislated against that backdrop. § 248a is about the Board set -- how the Board sets a price list for services. The premise of those services is they're available to whoever has a master account, but § 248a doesn't say you have to give a master account to everyone who asks. The Supreme Court had previously said that Reserve Banks have discretion about whether to accept deposits from any given requestor or not. So that's the backdrop against which Congress legislated.

I also want to just make clear the practical importance of this, right? So we heard a lot from my friend on the other side, Mr. Ortiz, about the dual banking system, right? I want to be clear about this: My client respects and values the dual banking system. We have nothing to say otherwise.

But the dual banking system is dual, right? And on their view of the world, it's not really dual. On their view

of the world, Congress said that the Reserve Banks have to open an account, have to accept deposits that go on the Reserve Bank's own balance sheet and create credit risk to the Reserve Banks from any institution that any state chooses to charter under any standards, any procedures, any level of diligence, any level of supervision, et cetera.

So even if the Reserve Bank thinks that a particular depository institution with a state charter has a dangerously inadequate anti-money-laundering policy or a dangerously inadequate set of controls on its business model creating credit risk to the Reserve Bank, it's too bad. Too bad. The Reserve Bank has no choice.

That's not a dual banking system. That's Congress turning over entirely control of the monetary system, the payment system to the states. There's no reason to think Congress would do that. That would be a really, really anomalous thing for Congress to do, and there's no indication that anyone in Congress thought it was doing anything remotely like that.

I want to address very briefly a couple of other points, and I'll let Mr. Chadwick do so, as well, if that's all right with Your Honor.

THE COURT: You may.

MR. BUCHOLTZ: It is true that there were meetings between my client and people in Wyoming involved in creating

this legislation. It is not true that my client ever said that any particular SPDI would be entitled to or would get a master account. I don't believe Mr. Ortiz said that, but I wanted to be clear about that. That would not be true.

And it also is true that my client has had a position for a long time -- always has been consistent and always has been clear -- that § 342 gives it discretion. And the other side -- Mr. Ortiz the pointed to places where various actors within the Federal Reserve System have used very general language to the effect that non-member banks, under the Monetary Control Act, have access to the services.

Well, that's true but, that's very different from saying that every single -- literally every single entity chartered by any state under any standards is automatically entitled to a master account regardless of the risks that the Reserve Bank thinks that creates. We've never said that, and respectfully, I think that's just not a plausible position.

I'll let Mr. Chadwick pick up from there unless Your Honor has questions specifically for me. Thank you very much for your indulgence with the time.

THE COURT: Thank you. Mr. Chadwick?

MR. CHADWICK: Thank you, Your Honor. Mr. Bucholtz stole some of my points, but one of them I wanted to underscore was the Monetary Control Act and the significance of that, Your Honor.

The Monetary Control Act was designed to give greater control over monetary policy, not less. And the point that Mr. Bucholtz makes about the modification of § 342 is of great significance. Congress left the discretionary "may," which has been in the original Federal Reserve Act since 1930 -- 1913 when it made that modification. And when it told the Board to set up pricing principles for the various services, it instructed the Board to recognize that there would be -- that access to those services would be available to both member banks and non-member banks. And prior to that, the deposit accounts had only been available to member banks, Your Honor.

And the last point I'll say, Your Honor, is the amount of resources that's been expended or continue to be expended both by the Reserve Bank and by the Board. There's a lot of very conscientious, very smart people thinking very hard about these issue. This is not something that's sitting idle. There is just an extended, on-site examination on the premises of Custodia. So this is no idle action, Your Honor. It is under active process.

And I appreciate your time. Thank you.

THE COURT: All right. Thank you, Mr. Chadwick.

Well, a couple things. First, I'm not going to rule from the bench on this. I've reviewed most, but I got a couple more thousand pages of materials that have been

submitted. It's not a thousand. I think there's only 343 pages of briefing.

But here's what I want to tell both sides: I think the tree is going to be trimmed, but the tree is not going to be cut down, and this matter will survive in some form. But I don't -- and I understand there's a lot of very competent and extremely bright and far more learned and skilled finance, banking, and regulatory individuals in the world that are looking at this, but I just don't see why we are looking at a length of time that's equal to the gestation of an elephant to figure this out with all those bright people.

So I -- nor do I believe, though -- and I understand my role. My role is to interpret the law and determine what Congress did or didn't allow or authorize. And it will -- my decision will be rendered forthwith as quickly as possible, and you can then go forward on those issues and your motion practice as you deem appropriate. But we will get this turned around certainly quicker than the application decision process.

All right. With that, is there anything else we can address, Mr. Ortiz?

MR. ORTIZ: No, Your Honor. Thank you for your time today. We appreciate it.

THE COURT: Mr. Chadwick?

MR. CHADWICK: No, Your Honor. Thank you very much.

THE COURT: Mr. Bucholtz?

MR. BUCHOLTZ: Thank you, Your Honor. Nothing further for me.

THE COURT: All right. Thank you all. Have a great day -- rest of your day and a good weekend.

We'll stand in recess.

(Proceedings concluded at 2:42 p.m., October 28, 2022.)

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C E R T I F I C A T E

I, MEGAN E. STRAWN, Federal Official Court Reporter for the United States District Court for the District of Wyoming, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing 64 pages constitute a full, true, and correct transcript.

Dated this 3rd day of November 2022.

/s/ Megan E. Strawn

MEGAN E. STRAWN
Registered Professional Reporter
Certified Realtime Reporter